No. 2949

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Plaintiff in Error.

vs.

TONY POSSUS,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF OF DEFENDANT IN ERROR

JOHN LYONS,
E. E. RITCHIE,
Attorneys for Defendant in Error.

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This brief of defendant in error will follow plaintiff in error in referring to the parties herein as in the trial court, plaintiff in error as defendant and defendant in error as plaintiff.

Defendant's brief makes thirty-nine assignments of error, suggestive of the celebrated thirty-nine articles of theology in length. Apparently impressed by the repetitions contained in these numerous assign-

ments counsel in argument have grouped their contentions into five, as follows:

1. If plaintiff is entitled to any compensation or damages for his injury he must seek the same under the workmen's compensation act alone (brief p. 41).

2. This joinder of actions cannot be maintained (p. 50).

3. There is no evidence sufficient to sustain the judgment entered on plaintiff's first cause of action (p. 57).

4. There is no evidence sufficient to sustain the judgment for plaintiff on his second cause of action (p. 60).

5. Errors in instructions given and refused (p. 63).

Answering the first of these propositions plaintiff denies the opening statement of defendant's argument under that head, that "Plaintiff's first cause of action is brought under the provisions of Chapter 71 of the Session Laws of Alaska, 1915, commonly known as the Workmen's Compensation Act." It is true that the case was tried upon that theory because the trial court so ruled, and the amended complaint stated the cause of action so as to comply with that requirement; but plaintiff contended then and does now that the act referred to is invalid because repugnant to the fourteenth amendment of the Federal constitution and to the organic act creating the Alaska legislature and defining its powers.

Assuming the Alaska compensation law to be

valid the question raised is whether an employe can claim any redress for an injury "arising out of his employment" or traceable to it further than that expressly provided in the schedules of the law. Defendant contends that the law is exclusive and inclusive, even in such cases as the one at bar. As shown in defendant's statement of the case plaintiff sued on two causes of action, the first alleging an injury due to an accident in the course of his employment, the second alleging aggravation of the natural results of the accident due to neglect and lack of skilful care of his injury by the defendant, which owed him competent surgical care and nursing because of his payment of hospital dues.

The contention that plaintiff has no remedy except under the so-called compensation law is based upon two provisions of the act. The first is contained in the first section providing that an employer of the class named in the act "shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury by accident arising out of and in the course of his or her employment." The second provision claimed as a base for the contention is the following:

> "Section 7. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided by this Act, shall accrue to

employees entitled to compensation under this act while it is in effect."

"Arising out of and in the course of employment," a term almost universally used in compensation acts, is defined as follows by Labatt's Master & Servant, Vol. 5, sec. 1806:

> "This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business."

Plaintiff contended at the trial and the trial court held that the aggravation of plaintiff's original injury through the failure and wilful refusal of defendant to afford him the medical care he was entitled to was not "an injury arising out of or in the course of his employment," but was a subsequent injury foreign to his employment and due to a new cause for which defendant was responsible. While the original injury primarily produced a condition which made the later injury possible the latter would not have arisen except for the new and independent cause. The additional injury, therefore, is not within the purview of the statute.

Arguing the exclusive feature of the Alaska law defendant cites the Washington case, Ross v. Erickson Construction Co., P. 155, 153, conceding that it was based on "a different and more elaborate statute." The Ross case cannot be cited as authority in this case because the Alaska law bears hardly a superficial resemblance to the Washington law. The

latter is an industrial insurance law, placing the whole subject of accidents in specified industries under the jurisdiction of an industrial insurance department, and creating a fund for payment of compensation. The law also declares its intent as follows:

> "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents, is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

In Stertz v. Industrial Insurance Commission, 158 P. 256, the supreme court of Washington says: (p. 259).

> "Ours is not an employers' liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the Industrial Insurance Commission. All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employe is no longer to look to the master even for the scheduled and mandatory compensation.

> He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued."

In the same opinion the court calls attention to the express definition of "injury" within the intendment of the act, as "an injury resulting from some fortuitous event." The statute avoids use of the word "accident."

Contrasted with this "exclusion of every other remedy" and withdrawal of the jurisdiction of the courts, and prompt payment of compensation through a state insurance board, is the provision of the Alaska law, (section 21) that "actions for recovery of compensation due under this act may be brought and determined in the courts of the territory." Clearly, decisions under the Washington law have no application to the Alaska law. Furthermore, in the Ross case the plaintiff had applied for and accepted an award by the state insurance board. And finally, the Washington supreme court conceded in that case that

> "An independent cause that in no way proximates the act out of which the right to compensation flows, might afford a ground of recovery, and might not be considered an 'aggravation' warranting an increase of compensation within the meaning of the act."

This reference to "aggravation" is to section "h" of the compensation schedule of the Washington law. So that even the state of Washington, with

its comprehensive plan of industrial insurance and its declared legislative intention to remove all phases of the matter of industrial accidents and compensation from private controversy does not deny that a case not within the expressed provisions of the law still stands as before the enactment.

None of the other cases cited by defendant's brief involved the same issue as the one under discussion here. Gregutis v. Waclark Wire Works, 92 Atl. 355, was an action to recover for accidental death and the sole question was whether the New Jersey compensation law superseded what was known as the Death Act, a law enacted to give a right of suit for death by wrongful act, a right which, as every lawyer knows, did not exist under the common law. The decedent was instantly killed, so no question of subsequent injury or aggravation of injury arose in the case.

In Re. Brightman, 107 N. E. 527, decedent was a cook on a lighter. The craft began to sink and he made several hurried trips from the lighter to the wharf carrying personal effects. He died soon afterward and the employer's insurer sought to defeat the claim for his death under the Massachusetts compensation law upon the ground that death did not result from a cause arising out of or in the course of his employment. The court held otherwise. No question of subsequent injury or aggravation not in the course of employment was involved.

Re. Sponatski, 108 N. E. 466, was another Massachusetts case in which an insurer sought to defeat

recovery. A workman made temporarily insane by a splash of molten metal in his eye jumped from a window and was fatally injured. The court said, "The inquiry relates solely to the chain of causation between the injury and the death," and decided the question in all such cases to be "whether the chain of causation between the injury and the death is broken by the intervention of some independent agency."

In all cases cited by defendant's brief the injured workman or his legal representative sought to recover under the compensation law and the employer or an insurer sought to show that the case did not come under the compensation law. In Re. Burns, 105 N. E. 601, (Massachusetts) the facts are stated by the court as follows:

> "He had sustained a mortal injury, one from which death must sooner or later ensue, a fracture of the spine, with a severance of the spinal cord, which caused not only a complete paralysis of the lower limbs, but a loss of power and sensation below the seat of the injury. He was taken to a hospital, and afterwards was under proper medical care until his death. He was obliged to lie in bed in one position; and by reason of this an extensive bedsore was developed, and this extended and grew worse until it brought about the blood poisoning which was the immediate cause of his death."

Is any independent, intervening agency stated here? The man's injury made it necessary for him to lie in bed in one position; he had proper medical care; but the bedsore developed and ultimately

caused blood poisoning from which death resulted. Is there any break there in the chain of direct causation? Was anything omitted which would or could have arrested the course of nature?

The English cases cited, like the Massachusetts and New Jersey cases, do not fit the facts of the present case. In all but one it was held to be shown that the results were directly traceable to the original injury; that the chain of causation was complete. In only one was the issue of malpractice raised, and that by the employer. In Beable v. Milton, 5 W. C. C. 55, the court held that the treatment was not defective and if it had been it would have been no defense to the employer because the applicant had gone to the hospital with his privity and consent. It was the employer who sought under the claim of malpractice to avoid any payment.

Neither does the law stated in Smith v. N. P. Ry. Co., 140 P. 687, deny plaintiff's right of action herein, but rather aids it, as the court held that if one is injured through another's negligence and the injury is afterwards aggravated "through some accident not the result of the want of ordinary care on the part of the injured person he may recover for the entire injury sustained."

Plaintiff's claim in this case under his second cause of action was that his injury was aggravated by the wilful refusal of defendant to give him the surgical and medical care to which he was entitled, which failure and not any "want of ordinary care on his part" caused the aggravation of injury.

A recent Kansas case under the compensation law of that state, Ruth v. Witherspoon-Englar Co., 157 P. 403, on a state of facts almost precisely that in this case, states cogently the meaning of the phrase "out of and in the course of employment." It is thus set forth in the first clause of the syllabi:

> "In an action under the Workmen's Compensation Act a recovery can be had only upon the basis of disability to labor received in the course of employment, without the intervention of an independent cause the separate consequences of which admit of definite ascertainment. It cannot be augmented by the fact that the disabling effects of the injury are increased or prolonged by incompetent or negligent surgical treatment even where the employer is responsible therefor."

In the foregoing case the plaintiff sought to recover compensation for total disability, alleging partial injury by the accident and total disability resulting from incompetent surgery employed for him by the defendant. At the same time he brought a separate action for additional damages because of the malpractice. The defendant appears to have agreed that the plaintiff's condition was mainly due to unskilful treatment, although as the court said, "this issue was somewhat obliquely introduced by the pleadings." The defendant pleaded the other action and the plaintiff's allegations therein. Judgment for total disability was given and reversed on appeal, the supreme court saying:

"The plaintiff was entitled to recover com-

pensation based only on such disability, total or partial, as resulted from the injury received in the course of his work, without the intervention of an independent agency. The matter is not confused by the need of determining what results might have been anticipated, or by any refined distinctions between proximate and remote causes; for whether and to what extent disability in such a case as the present has been increased by want of proper surgical care admits of reasonable definiteness and certainty. If it should be proved here, for instance, that the whole effects of the plaintiff's injury would under proper treatment have disappeared within a year, that would obviously be the limit of the period for which he could recover compensation in this action. His judgment here could not be increased by the fact that through the incompetent or negligent handling of the case by physicians a disability which would otherwise have been temporary was rendered permanent. Della Rocca v. Stanley Jones & Co., (1914) W. C. & Ins. Rep. 33, annotated in 6 N. C. C. A. 624. Even if circumstances had been shown sufficient to charge the defendant with responsibility for the fault of the physicians, the rule would not be altered; for liability under the compensation act cannot be made to depend upon the degree of care exercised. A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as part of the ordinary expense of operation. So much of an employe's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employ-

> ment' within the meaning of that phrase as used in the statute. Laws 1911, c. 218, Sec. 1. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number. It was doubtless desirable that the malpractice issue should have been distinctly presented in the pleadings, but in any event it was incumbent on the plaintiff to show what degree and duration of incapacity was the direct result of the original injury received in the course of his work, without the intervention of an independent cause."

The Kansas compensation law under which this decision was rendered stated its scope as applying to "personal injury by accident arising out of and in the course of employment," the exact language of the Alaska law. Plaintiff submits that the foregoing extract from the opinion of the Kansas supreme court is irrefutable in its logic and exhausts argument on the issue.

Second. Defendant next urges that "This joinder of actions cannot be maintained."

Compiled Laws of Alaska, 1913, Section 916, provides that "The plaintiff may unite several causes of action in the same complaint when they all arise out of—First. Contract, express or implied; Second. Injuries, with or without force, to the person. * * * * "But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of trial, and must be separately stated."

No attempt is made by defendant to argue that plaintiff's complaint fails to meet the requirements of the second class named, but counsel seek to uphold their contention by vague reliance upon decisions under other codes of practice holding that common law and statutory causes of action, and tort and contract causes cannot be joined. Any authorities in support of those propositions are inapplicable to this case. First; because in Alaska common law and statutory causes can be joined in the same action if all belong to the same class and comply with all other conditions of section 916, supra. Second; tort and contract can be joined if they comply with the requirements, or by the weight of authority they can be united regardless of class if they grow out of the same transaction although the code does not expressly so provide. Third; it is not true that the first cause of action herein is founded in tort and the second in contract.

We will consider first the question whether either or both of the causes of action is strictly in tort or contract. Defendant asserts "That the first cause of action is an action *ex delicto* needs no argument." (brief, p. 52) With equal confidence the court of errors and appeals of New Jersey asserts:

> "The liability enforceable in a proceeding under the Workman's Compensation Act is not a liability arising out of negligence but a contractual relation created by the act with the consent of both employer and employe." Winfield v. Erie R. Co., 96 Atl. 394.

And the court adds that this obligation "exists

although no negligence can be imputed to the employer." (p. 383) To the same effect the Massachusetts supreme judicial court says of the compensation law of that state:

> "It is plain and has been said repeatedly that the act eliminates all consideration of tort, penalty or negligence, save where there has been 'serious or wilful misconduct.'" Re. Madden, 111 N. E. 379-383.

It is difficult to see why counsel for defendant reiterate from time to time that the first cause of action is founded in tort. This would be true if the compensation law were not involved, but repeatedly in the pleadings and in a general objection to the introduction of testimony, (R. 60) counsel contended that the first cause of action was governed wholly by the Alaska compensation law and therefore the measure of compensation was controlled by that law. Counsel objected to the admission of any testimony designed to show the primary cause of the injury. By stipulation in open court the facts of the case as stated by plaintiff's complaint up to the occurrence of the accident were admitted and that portion of the complaint was read to the jury as evidence. (R. 65-66) The following proceedings then took place.

> "Q. (By plaintiff's counsel) What caused the car to strike that rock wall?
>
> Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial—we admit he did strike the wall and got injured.
>
> By The COURT—In view of the pleadings and the admission the objection is sustained.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE—In order to save the record we desire to make an offer to prove by this witness—

Mr. DONOHOE.—I insist on the jury being dismissed before that is done, or that it be reduced to writing.

(Whereupon, without the hearing of the jury, in the presence of counsel and the court, the following proceedings were had:)

Mr. RITCHIE.—We offer to prove by the testimony of plaintiff that the cause of the contact of the car with the rock wall in said mine, resulting in the injury to plaintiff as set out in plaintiff's first cause of action was due to a defective brake on said car, causing the same to become uncontrollable and to run away at great speed."

By The COURT.—The offer to prove will be denied and exception allowed plaintiff." (R. 66-7).

Counsel for defendant insisted throughout that the liability on the first cause of action was defined and limited by the compensation law, a contention that nobody will dispute if the law is valid. After laboring throughout the trial to make a panoply and shield of the act counsel certainly become involved in confusion of thought when they now attack the basic principle of compensation laws by arguing that a liabiilty under this act is founded in tort. A liability for a tort is for unliquidated damages, arising out of a wrongful act. Compensation laws provide fixed payments for described injuries occurring within the scope of the law. The Alaska act provides in its

first section that employers of a certain class,

> "Shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment."
>
> Section 7 provides that "The right to compensation and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise."

By taking away negligence as a condition of recovery a compensation law plainly eliminates the tortious character of injuries within its scope. The only proof required or admitted, as ruled by the trial court in this case, is that which shows the extent of the injury.

The question of tort also arises in considering the second cause of action, which the trial court held to be outside the scope of the compensation law. In their brief for defendant counsel do not touch upon the fixed principle of law that a breach of contract may be tortious, and that a plaintiff may treat the injury either as a breach of contract or a tort. The plaintiff in the case at bar was entitled to regard his second cause of action as either in tort or contract, so that regardless of any other ground of joinder it could be united with the first cause of action whether that is held to be a tort, as defendant contends, or a contract, as the courts of Massachusetts and New Jersey classify it. On this question of tort and contract the following authorities are illuminating:

"The difficulty of defining a tort in accurate phraseology was commented on by Finch, J., in Rich v. New York Cent. R. Co., 87 N. Y. 382, 390, in the following language: 'We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto,* there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. The text writers either avoid a definition entirely or frame one plainly imperfect or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes.'' 38 Cyc. 415, note 1.

"A tort may grow out of or be coincident with a contract, and a suit will lie in tort for an act of misfeasance or malfeasance, although a contractual relation may exist between the parties. Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. The rule has frequently been applied in actions against common carriers and other bailees, factors, brokers, and other agents, telegraph and telephone companies, physicians and surgeons, (citing Randolph v. Snyder,—Ky. 1910—129 S. W. 562) and in many other cases.'' 38 Cyc. 428-9.

"In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. The

tort in such a case is connected with the contract only as it enables the tort-feasor to bring the party wronged into it." Cooley on Torts, pp. 104-5, 2d Ed.

The second cause of action in plaintiff's complaint stated such a case. It was for a tortious breach of a contract and could be united in the same action with another cause of personal action between the same parties admitting the same place of trial and a similar judgment. Further, both causes grew out of the same transaction. A case almost parallel in facts is the Washington case of Harding v. Ostrander Ry. & Timber Co., 116 P. 635. Harding alleged his injury in a logging camp and further injury and unnecessary suffering because the company wilfully neglected and refused for twenty-four hours to take him to a hospital, although it had exacted and withheld from his wages, as from all employes, $1 per month for maintenance of a hospital for the care and treatment of injured employes. The defendant company demurred on the ground of misjoinder, alleging that plaintiff had united a cause of action *ex delictu* with a cause *ex contractu*. The Washington supreme court said: (p. 637-8).

"The differences in legal meaning between a tort and a contract are often extremely shadowy and indistinct. For instance, Mr. Bishop, in his work on Noncontract Law, Sec. 4, says: 'The word tort means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance in rights which the law has cre-

ated either in the absence of contract, or in consequence of a relation which a contract had established between the parties.'

"All the injuries complained of in the case at bar have their origin in contract. It is patent, therefore, that, in the larger sense, the entire causes of action spring from contractual relations."

The statement just quoted practically covers all the issue of misjoinder in the case under consideration. The entire transaction was grounded in contract, though the second involves a tortious phase. The cases cited by counsel on page 54 of their brief do not meet the issues. In Boylan v. Hot Springs, etc., 132 U. S. 148, the plaintiff had been ejected from a train because he had failed to have the return coupon of his ticket stamped, as required by its terms. The court simply held that he had no cause of action because he had himself failed to comply with the contract.

In Sanders v. Stimpson Mill Co., the plaintiff sought to recover damages for an injury due to an accidental shot from the gun of a hunter who was riding by permission on the tug of which plaintiff was engineer. He also asked for the expense of his surgical and medical care under general maritime law. It presented a widely different issue from the case at bar.

As for Clark v. Great Northern Ry., 72 p. 477, which decided that cause of an action for breach of contract of carriage on a railroad ticket could not be united with a cause for injuries in being ejected from a train, it is not authority for this case, because the

joinder was of causes on a different basis and different state of facts from the case at bar, because it ignored the fact that only one transaction was involved, and finally, it is against the weight of authority, including Harding v. Ostrander etc., supra, from the same state, (Washington) and Sloane v. So. Cal. R. Co., 44 P. 320 (Cal.), which involved precisely the same issues as the Clark case, that of a passenger with a ticket being ejected from a railroad train.

A long list of authorities on the point involved in this joinder issue may be found in a note to Flint & Walling Mfg. Co. v. Becket, 12 L. R. A., 924, (167 Ind., 70 N. E. 503). Throughout the decisions the rule is admitted that a tort arising out of contract may be treated as either a tort or a breach of contract.

And regardless of any other ground for joinder, it was proper under the second provision of section 916, Alaska code, supra, permitting two causes of action to be united when they all arise out of injuries with or without force to the person.

Defendant's objection that common law and statutory causes of action cannot be joined is denied by almost universal authority. One of the cases cited in defendant's brief, McHugh v. St. Louis Transit Co., 88 S. W. 853, (Mo.) sustains the joinder, holding merely that the two could not be united in one count. The court said, as quoted in defendant's brief, "an action for damages at common law for negligence cannot be joined to one for statutory negligence, but the entire paragraph is as follows: (syllabus 2.)

> "Under Rev. St. 1899, sec. 593, requiring separate causes of action united in the same petition to each be separately stated, with the relief sought in each, so that they may be distinguished, an action for damages at common law cannot be joined in the same count with one for statutory negligence."

The petition in that case alleged that plaintiff was injured by the gross negligence of the defendant, a conductor of one of its streetcars having started the car while plaintiff was in the act of getting off. Further, that in so doing the company violated an ordinance of the city of St. Louis which required conductors not to permit women and children to alight from a car in motion. The supreme court said (p 855):

> "That the petition states two causes of action is, we think, clear—They are independent of each other, and upon either an action might be maintained, but they cannot, under the rules of good pleading, be embraced in the same count. If embraced in the same petition, they should be stated in separate counts."

Abernathy v. South & W. R. Co. 63 S. E. 180, cited by defendant, was a North Carolina case, involving title to land, trespass, condemnation proceedings and damage to a mine on the land. It bears no resemblance to this case. The following authorities uphold the joinder of common law and statutory demands for personal injuries in one action, between the same parties with the same place of trial. Mr. Labatt says:

> "In England it has been customary to join

common-law and statutory causes of action in the same suit, and in spite of one judicial intimation adverse to this rule of procedure, its propriety may, perhaps, be regarded as being now no longer open to controversy.

"In Massachusetts the propriety of such a joinder has never, so far as the writer knows, been questioned, and a large number of cases might be cited in which the complainant has included counts setting forth claims both under the statute and at common law. A similar remark is applicable to the Alabama course of practice." Labatt's Master and Servant, Vol. 5, sec. 1738.

"It is common practice, and permissible, to join different counts based on the violation of different duties, and also counts based on the common law and counts based on a statute. And not only may the complaint join counts for a common law cause of action with counts based on a statute, but also counts based on different subdivisions of the statute." Bailey Personal Injuries, Vol. III, sec. 846.

The provisions of the Alaska Code of Civil Procedure having been taken verbatim from the Oregon code, decisions of the Oregon courts are controlling. The recent Oregon case of Hoag v. Washington-Oregon Corporation, 147 P. 756, involved the question of common law and statutory joinder in a different way from that raised in the case at bar, but plaintiff submits that the reasoning of the court applies herein. On page 759 the opinion says:

"All breaches of legal duty arising out of one transaction, whether flowing from common law

or from the statute, constitute but one cause of action, unless the statutory remedy is so inconsistent with the common-law remedy that the same judgment could not be rendered upon recovery."

"The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether a common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source."

Defendant's contention on pages 56-7 of its brief that to allow these two causes of action to be maintained would permit plaintiff to be compensated twice for the same injury has already been answered in this brief. The two causes of action set up two injuries, one arising out of and in the course of employment and the other an additional injury not arising in the course of employment nor out of the employment but due to a tortious breach of contract. It is difficult to understand why counsel for defendant argue that these are "the same identical injuries."

Defendant complains (Brief, p. 43) because evidence bearing upon the second cause of action may have influenced the jury in arriving at a verdict on the first cause of action and argues that "as to the first cause of action standing alone such testimony was highly prejudicial to the substantial rights of the defendant as it tended to bias and prejudice the jury against the defendant. That is the great vice of permitting the two causes of action to be joined."

This solemn arraignment applies with equal

force to all cases, civil and criminal, wherein more than one count is pleaded. Even the technical common law system of pleading and practice allowed many kinds of joinder. The law is scrupulous about the rights of persons accused of crime, yet section 1024 of the Revised Statutes of the United States provides for joining in one indictment several charges for two or more acts or transactions connected together, or two or more acts or transactions of the same classes of crimes. Alaska has engrafted this provision verbatim upon its criminal code.

It is needless to suggest to this court that in the trial of such an indictment part or all the testimony offered to prove one count may have no connection with other counts. Yet the statute permits this "great vice" assuming that a jury of presumed intelligence, under proper instructions from the court, will, in considering each count apply only the evidence bearing upon it. So in civil trials involving joinder of causes of action the jury presumably exercises the same discretion. Codes of civil procedure are framed with that assumption in view. Inasmuch as it must be conceded that many cases of joinder are permitted as proper it must also be conceded that joinder is not harmful *per se*. Code provisions for joinder not permitted at common law arose from the admitted evils of a multiplicity of suits involving similar issues between the same parties. The scope of joinder provisions is constantly widening and in many states all causes of action arising out of the same transaction may be united in one suit.

However, the vice or virtue of joinders in general or of the particular joinder involved in the case at bar is not before the court. The question is whether it is permissible under the Alaska code, and plaintiff urges that the joinder is favored by the great weight of authority construing the Oregon codes, from which the provision relied on was taken, and similar codes, and further, by the constant tendency toward simplicity in procedure.

Defendant's third and fourth contentions as grouped in argument, namely, "that there is no evidence sufficient to sustain the judgment entered on plaintiff's first cause of action," and the same of the second cause of action, scarcely require answer in view of the practically uniform rule of federal courts not to inquire into a finding of fact included in the verdict of a jury. Nevertheless, plaintiff will here call attention to the testimony of plaintiff, given on pages 72-73-83 of the record, stating his own knowledge of his injuries; the testimony of Dr. Boyle given on pages 125-6-135 of the record; of Dr. Winans, given on pages 154-5 of the record; of Dr. Chase, given on page 169; all tending to show permanent injury to the shoulder. The weight of the evidence being for the jury questions of fact are no longer open.

Errors assigned in the instructions to the jury and urged by defendant are the following:

That No. 11, (R. 389, assignment xxiv) stating that if defendant denied the existence of plaintiff's disability and refused him further care, plaintiff thereupon became entitled to leave defendant's

premises and to control his own movements and defendant could not thereafter require him to return, was error because it assumed a fact not in evidence. The evidence is on pages 76-111-2 of the record. Plaintiff testified that Mr. Estey ordered him out of the bunkhouse and out of the company office. Estey was the chief authority at the Ellamar mine at that time, by admission of defendant. (R. 199) Dr. Duckwall had testified (R. 224) that he notified plaintiff that there was "nothing wrong with his right shoulder or right clavicle and that he could go to work in the mine as a miner any time he wanted to;" that he also made the same statement to the officers of the company.

Defendant excepts to Instruction 14 (R. 389, assignment xxv) in which the court gives the substance of plaintiff's complaint, on the ground that the statement is incomplete and incorrect. A reading of the instruction shows that the exception is wholly unfounded. The court merely stated the allegations of the complaint as averments by plaintiff.

Defendant excepts to instruction 16, (R. 390, assignment xxvi) that the payment of hospital dues by plaintiff was in effect a contract binding the defendant "to furnish the plaintiff competent surgical and medical attendance for any injury or illness arising in the course of his employment, providing that in the event of no specific agreement to the contrary defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent

physicians justly demanded. "Defendant argues (brief 66) that this was an instruction that defendant was obliged to keep a competent physician at the mine. Plaintiff submits that the instruction answers the objection. It would be difficult to make it more favorable to defendant without instructing the jury that defendant was not liable at all. The reference to "competent physicians" merely means that defendant would be liable for consequences if it failed to call a physician when one was needed. Instruction 25 (R. 321) specifically states that "the defendant company was not bound to maintain a physician and surgeon at its mine."

Defendant's objections to instructions 17 and 18 (R. 391-2, assignments xxvii-xxviii) appear to plaintiff to require no comment.

Assignment xxix (R. 393) alleges error in the refusal to instruct the jury that defendant might at any time lawfully require plaintiff to return to Ellamar for examination, basing it on the section of the compensation law which provides for such examination. In referring to this provision counsel neglect to quote the stipulation that the employee shall "at reasonable times" submit to examination. (Sec. 24, Chap. 71, Laws of Alaska, 1915.) The record shows that when the requests were made that plaintiff submit to examination at Ellamar he was living in Valdez, (R. 190-192). If defendant could require him to return from Valdez it could require him to return from New York. Furthermore, he did finally go to Ellamar for examination, (R. 232) and he sub-

mitted to examination by defendant's physician in Valdez just prior to the trial of the case. (R.245.) Further comment seems superfluous.

Plaintiff submits that the objections to refusals to instruct stated on pages 69-70-71-72, of defendant's brief and in assignments of error xxix, xxx, xxxi, xxxii, xxxiii and xxxiv are not well taken because all the law contained in the proffered instructions is covered in the instructions given by the court.

Assignment xxxvi raises the contention that defendant could demand that the court submit to the jury a form of verdict submitted by it. This was aptly answered by the court as follows: (R. 333).

> "The Court is not submitting a verdict to the jury; the Court is submitting a form of verdict which they may use if they choose in making up their verdict; it is not directory to the jury—they will not use it unless they so desire, but if they so desire, they may use it in making up their verdict."

Counsel for plaintiff (defendant in error) respectfully submit that if either party received less than his due it was the plaintiff, who might with reason claim that the evidence justified a larger verdict than the jury returned; that the issues were fairly joined; that no errors of importance, if any, appear in the record either in the admission of evidence or instructions to the jury; and that the case was decided on its merits.

JOHN LYONS
E. E. RITCHIE
Attorneys for Defendant in Error.